

ATTACHMENT A

THE PROPOSED DECISION

**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA**

In the Matter of the Application for Disability Retirement of:

ANGELA M. ACEVES, Respondent

and

**RIVERSIDE COUNTY SCHOOLS-MOUNT SAN JACINTO
COMMUNITY COLLEGE DISTRICT, Respondent**

Agency Case No. 2020-1307

OAH No. 2021020265

PROPOSED DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on January 24, 2022, by video conference due to the COVID-19 pandemic.

Preet Kaur, Senior Attorney, represented complainant, Keith Riddle, Chief, Disability and Survivor Benefits Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Teresa S. Renaker, Attorney at Law, Renaker Hasselman Scott LLP, represented respondent, Angela M. Aceves.

There was no appearance by Riverside County Schools-Mount San Jacinto Community College District.

Oral and documentary evidence was received. The record was left open until February 2, 2022, for the parties to submit closing briefs. The parties did so, the record was closed, and the matter was submitted for decision on February 2, 2022.

SUMMARY

Respondent has the burden to prove that, at the time of her application, she was permanently disabled or incapacitated from performing her regular and customary job duties as an Administrative Assistant III, Instruction. CalPERS found, based on an evaluation conducted by an independent medical examination (IME) board-certified in neurology, that respondent was not substantially incapacitated at the time of her application due to neurological (Multiple Sclerosis (MS) and cognitive impairment) conditions. At the hearing, respondent did not present competent medical opinion to support her claim that she was permanently disabled or incapacitated from performing the regular and customary duties of the position. Accordingly, respondent's claim for disability retirement is denied.

FACTUAL FINDINGS

Preliminary Matters

1. Respondent was employed at Mount San Jacinto Community College as an Administrative Assistant III, Instruction. Because of her employment, respondent was a local miscellaneous member of CalPERS subject to Government Code section 21151.

2. On April 4, 2020, respondent applied for disability retirement based on neurological conditions (MS and cognitive impairment). CalPERS obtained medical records and reports related to respondent's conditions, and selected Khaled A. Anees, M.D., a board-certified neurologist, to perform an IME. Dr. Anees performed this examination and provided CalPERS with a report and supplemental report of his findings and conclusions. After reviewing these documents, CalPERS determined that when respondent filed her application for a disability retirement, she was not permanently disabled or incapacitated from performing the usual and customary duties of an Administrative Assistant III, Instruction, due to her neurological condition.

3. On September 22, 2020, complainant notified respondent of the determination and advised of her of appeal rights.

Respondent timely appealed by letter dated October 9, 2020, and this hearing was scheduled with OAH.

CalPERS's Medical Evaluation Conducted by a Medical Expert

4. Dr. Anees testified regarding his evaluation of respondent and his conclusions whether she is substantially incapacitated from performing the job duties

of an Administrative Assistant III, Instruction. He also prepared a report and supplemental report, and his testimony was consistent with what he wrote in his reports.

5. Dr. Anees is a board-certified neurologist and is licensed to practice medicine in California. After obtaining his medical degree in Egypt he completed his residency in neurology at the Cleveland Clinic and then completed a fellowship in neuromuscular medicine and EMG. He became board certified in 2010. Dr. Anees has performed IMEs for CalPERS since 2015. He also performs qualified medical examinations (QMEs) and agreed medical examinations (AMEs) in workers' compensation cases. He stated he is familiar with the legal standard for disability retirement.

6. In his evaluation of respondent, Dr. Anees reviewed respondent's treatment records from her two treating neurologists: Robert Klein, M.D., and Edward Spellman, M.D., for the period from January 2011 to August 23, 2021. Dr. Anees detailed the materials he reviewed in his report dated September 8, 2020, and supplemental report dated December 2, 2021, and his findings and conclusions based on the IME he conducted of respondent.

7. The records from Drs. Klein and Spellman included an MRI report dated February 2, 2021, Dr. Spellman's April 26, 2021, progress note, and an October 1, 2019, report of the Montreal Cognitive Assessment (MOCA) Dr. Klein administered. An MOCA is a test used to measure cognitive functioning. Initially, Dr. Anees incorrectly considered whether respondent was able to perform the duties of an Administrative Assistant/Library Technician III based on a job description for this classification he was provided. The college assigned respondent to this position, as noted below, as an accommodation because she was unable to perform the duties of an Administrative

Assistant III, Instruction. Subsequently, Dr. Anees prepared a supplemental report which indicated he reviewed a document entitled "Job Duty Statement" for an Administrative Assistant III, Instruction position and another document entitled "Physical Requirements of Position/Occupational Title" for this position, which outline the tasks and physical requirements of an Administrative Assistant III, Instruction.

8. On September 8, 2020, Dr. Anees examined respondent. His examination consisted of physical and neurological assessments of her cognitive, motor, and balance functioning.

9. As part of this examination Dr. Anees also administered the MOCA test to assess respondent's cognitive functioning. He also "indirectly" performed another mental assessment of respondent during his examination by his interaction with her and her responses to his questions.

10. Based on his examination of respondent and his review of the records, Dr. Anees found that respondent is not substantially incapacitated from performing the duties of an Administrative Assistant III, Instruction.

11. In reaching this conclusion, Dr. Anees found that respondent has a history of MS with cognitive symptoms and complaints. As objective findings, however, respondent displayed only reduced sensation in her left lower extremity. The results of the rest of the examination - her reflexes, and the cranial nerve examination, -were normal. Dr. Anees noted that there was no indication of pathological reflexes to indicate evidence of nerve damage.

Dr. Anees further noted that his findings are similar to Dr. Spellman's objective findings. He said Dr. Spellman's exam findings were unremarkable and did not reflect significant objective findings.

12. Regarding respondent's cognitive function, Dr. Anees testified respondent scored 27 out of 30 on the MOCA test he administered which is within the normal range. He noted that a score of 26 is considered within normal limits. He added that some studies use a cutoff of 23 due to false positives. Dr. Anees commented that people with severe cognitive difficulties have an average score of 22; persons with dementia have an average score of less than 20. Based on his indirect mental assessment of respondent, Dr. Anees found respondent to be alert and oriented and able to follow commands. He also evaluated her speech and word formation. Dr. Anees said she complained of fatigue and lightheadedness.

13. Dr. Anees noted that respondent had a stutter in her speech. Respondent's stutter was very noticeable during her testimony. Dr. Anees, however, did not consider her stutter a "significant" neurological impairment. He found it significant her speech content was "intact," and her stutter was "much less severe" as Dr. Spellman documented in his July 26, 2021, note.

14. Dr. Anees acknowledged respondent scored 25 in the MOCA test Dr. Klein administered on October 1, 2019, and this score is below the 26 normal range score. Dr. Anees said that this one-point deviation below the normal range is not enough of a deviation to say that respondent has a significant cognitive impairment considering his exam findings of respondent, and further considering Dr. Spellman's normal findings.

Also, to explain why he didn't consider the 25 score as a basis to find respondent has a cognitive impairment, Dr. Anees said that performance on the test can be affected by different factors including the effects of medication.

15. In response to questions on cross-examination, Dr. Anees agreed that fatigue could have contributed to respondent's performance on the MOCA, and fatigue is documented as a symptom in respondent's records, including a November 21, 2019, record that noted she "easily gets fatigued." But, Dr. Anees said that he did not find that respondent's reported fatigue was the result of objective medical findings to indicate she is unable to perform her job duties on this basis. He declined to offer an opinion whether respondent's fatigue complaints were credible.

16. On cross examination, Dr. Anees was asked about respondent's February 2, 2021, MRI which showed approximately 30 "coalescent lesions" on the right and left side of respondent's brain. The report noted that "[s]everal of these lesions are coalescent and large." Two of the lesions are "compatible with black hole lesions." Dr. Anees stated that these findings are consistent with the changes and abnormalities of MS and indicative of the disease process. It is hard to correlate, he said, the lesions with specific cognitive impairments.

Respondent's Testimony and Evidence

RESPONDENT'S TESTIMONY

17. Respondent's testimony is summarized as follows:

Respondent started working at Mount San Jacinto in 2009. Before that, she worked for Riverside County. She worked as an Office Assistant III for six years. She became an Administrative Assistant III, Instruction in 2016.

In July 2010 she was diagnosed with MS and she developed symptoms that affected her ability to do her job as an Administrative Assistant III, Instruction. She was able to do the job at first. But she started having trouble doing the job when she had

trouble doing budgets. Her job duties involved overseeing the budget for a new grant at the college. She had a hard time adding, putting things together, and submitting the documents on time. Towards the end of 2018, she said she knew something was wrong and she contacted Dr. Klein.

At first respondent was able to oversee the budget. She also recorded the absences of deans and vice presidents at the college and took meeting minutes, transcribed them, and distributed them to the people who were in the meetings.

At some point respondent was not able to do the meeting minutes. She could not remember what people said and she had a hard time transcribing the minutes because she could not remember what was said. She told the vice president of the college she was having trouble doing that task.

Respondent also noticed she was having problems getting the budget to balance; she never had problems balancing anything, but she was suddenly unable to get it straight. She reached out to Business Services for help balancing the budget. She said she would look at the spread sheet over and over but could not add anything up.

Respondent said she tried to exercise to help with the stress with what she was experiencing. She tried to walk to clear her head. To do her job, respondent needed to work long hours and started at 7:00 a.m. and stayed to 7:00 p.m.

As far as her treating for MS with Dr. Klein, respondent said when she had a flare-up he administered Solu-Medrol¹ through an intravenous (IV) feed. She also

¹ Solu-Medrol is the brand name for methylprednisolone which is a medication used to treat various conditions including exacerbations of MS.

talked to him about being able to perform her job duties. Dr. Klein recommended if the college couldn't accommodate her, she should step down; she didn't want to do that.

Respondent then talked to human resources at the college. The college decided to put her in a less stressful position; she was assigned a library technician position. Respondent was supposed to monitor student workers and a little budgeting regarding fines. Respondent said she couldn't understand the software for the new program.

Respondent again contacted human resources about the problems she had doing this job. She was having trouble understanding the software and trouble organizing weekly reports of the cash register and submitting them. She could not get the "till" to balance as much as she tried to recount. This caused her to be behind in submitting these weekly reports.

Because there were no other positions to accommodate her, human resources advised her to step down which she didn't want to do.

Regarding obtaining support from Drs. Klein and Spellman for her retirement disability application, she said Dr. Klein retired. She said Dr. Spellman was unwilling to testify on her behalf because she was told the medical group where he works would not allow him to do so.

DOCUMENTS RESPONDENT SUBMITTED ON HER BEHALF

18. Respondent submitted a number of documents at the hearing to support her application which were received as evidence: The progress note from Dr. Spellman for respondent's April 26, 2021, office visit with him; the MOCA score sheet Dr. Klein

administered on October 1, 2019; an office visit note for follow-up to review MRI results dated May 18, 2017; an office visit note dated October 1, 2019; a letter from Dr. Klein dated October 1, 2019, regarding respondent's ability to perform her job duties; a "Supplemental Medical Questionnaire" signed by Dr. Klein dated November 21, 2019; a "Physician's Report on Disability" signed by Dr. Klein on March 6, 2020; an MRI report dated February 2, 2021; a note dated February 10, 2021, regarding follow-up medication therapy for respondent; and a "Provider Reconsideration (Appeal) Form" dated June 9, 2021, regarding the medical necessity for oral medication to treat respondent's MS. Dr. Klein's October 1, 2019, letter, the supplemental questionnaire he completed, and the Physician's Report on Disability were not admitted.²

19. The May 18, 2017, progress note documents that Dr. Klein reviewed the MRI results with respondent and compared the results to the 2010 MRI. The results from both studies showed hyperintense MS plaques and at least one black hole on each side. Respondent reported tingling on the ride side of her scalp or face or right arm that comes and goes occasionally. Dr. Klein discussed MS and management of the condition with respondent.

20. The October 1, 2019, progress note documents respondent's follow-up visit with Dr. Klein. Respondent had not been on any disease modifying therapy. She complained of forgetfulness and "'brain fog,'" she was having more trouble doing her

² Complainant in his closing brief incorrectly states that the Supplemental Medical Questionnaire (Exhibit G) was admitted for all purposes at the hearing. Complainant's objection to its admission was sustained in part, and the exhibit was admitted as administrative hearsay pursuant to Government Code section 11513, subdivision (d).

job, performing financial management, and learning new tasks. She said she had difficulty remembering how to do things and she needed to write a lot of notes. She reported as strong tingle involving her left leg.

Dr. Klein recorded that he administered the MOCA test and respondent scored 25 out of 30. She forgot four out of five recall words and did poorly on subtraction.

Under the section of his note, captioned "Impressions and Recommendations," Dr. Klein stated under Problem #1 that respondent was having more symptoms with her MS and she should start disease modifying therapy. He identified the medication Tecfidera. Under Problem #2 Dr. Klein recorded that "Memory loss with easy distractibility and confusion could be related to [MS]." He discussed this with her and gave her a note for her employer for her to find a less stressful position that does require learning much new material.

21. Records dated February 2 and February 10, 2021, record the results of an MRI performed on February 2, 2021. The results of the MRI are discussed in Dr. Spellman's April 26, 2021, note immediately below. The note also documents that respondent was prescribed 1000 mg of Solu-Medrol 1000 to be administered by IV.

22. The April 26, 2021, progress note records that respondent reported since November 2020 she was having "marked worsening" with increasing stuttering speech that persists. Parenthetically, here, Dr. Spellman noted that respondent also reported increasing stress with dealing with her son who has Attention Deficit Hyperactivity Disorder and problems in high school during the pandemic. Respondent stated she had constant pins and needles sensations in her feet radiating to both her knees, muscle spasms in both feet twice a night that keep her up, and occasionally her feet and legs felt heavy without any actual paresis/paralysis in arms or legs. In addition,

respondent stated she had urinary incontinence at night. Dr. Spellman noted that "due to this," referring most likely to her urinary incontinence during the night, she had constant memory difficulties.

In this note, Dr. Spellman documented, as mentioned earlier, the February 2, 2021, results of the MRI of respondent's brain which showed multiple lesions and two "black hole" lesions.

As recorded in this note, Dr. Spellman examined respondent and documented his exam findings. Dr. Spellman's examination findings were consistent with Dr. Anees's exam findings, as Dr. Anees testified.

Dr. Spellman noted respondent was positive for fatigue, weakness, lightheadedness and numbness. At the same time, he found her cognition normal. Although she exhibited marked stuttering, she had otherwise normal language and no dysarthria (difficult or unclear speech articulation). Respondent was able to recall three out of three words immediately and one out of three words with a delay of three minutes.

Dr. Spellman found her cranial nerves, motor functioning, coordination and reflexes also normal. He noted respondent's gait was slightly slow, but her stance and step were normal. He found, based on a pinprick test, she had markedly reduced sensation in her toes. Based on a vibration test, respondent had markedly reduced sensation in her toes and ankles and mild to moderate sensory reduction in her knees.

Based on his evaluation, Dr. Spellman assessed respondent with chronic MS. He started her on a regimen of oral medications, including Tecfidera, a medication used to treat MS, to prevent further exacerbations and/or progression of MS.

23. Respondent also submitted the score sheet for the MOCA test Dr. Klein administered on October 1, 2019. Her overall score was 25 out of 30 as noted earlier. She recalled one out of five words on the delayed recall part of the test and scored two out of three on the serial subtraction part of the test.

24. In the document captioned "Provider Reconsideration (Appeal) Form" dated June 9, 2021, Dr. Spellman described the medical necessity for respondent's need for generic difumarate or Tecfidera. He wrote respondent must start these medications ASAP due to "worsening relapses/progression" of MS. He cited the February 2, 2021, MRI study which showed "multiple lesions."

The Parties' Arguments

25. Complainant's arguments in his closing brief are summarized as follows: CalPERS exercised its duty to evaluate respondent's application and determined she does not qualify for disability retirement. CalPERS is entitled to the presumption its decision is correct and respondent has the burden to rebut this presumption, the burden of proof of going forward and the burden of persuasion by a preponderance of the evidence. (CalPERS's Closing Brief, p. 6 citing *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.)

The determination whether an employee is incapacitated must be based on the opinion of a medical expert and the medical expert's opinion "must be competent/admissible" evidence. (CalPERS's Closing Brief, p. 11.) Respondent did not present any "competent medical opinion" that she is substantially incapacitated and did not meet her burden of proof accordingly. Complainant argues further that the increased risk of aggravation of respondent's condition and her fear that her condition will get worse are not bases to find she is substantially incapacitated. (CalPERS's

Closing Brief, pp.13-14 citing *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 864.)

26. Respondent in her closing brief makes a number of arguments which are summarized as follows: First, she points out that "Multiple sclerosis is an incurable, progressive disease subject to . . . periods of remission and exacerbation." (Respondent's Closing Brief, p. 2 citing *Parish v. Califano* (6th Cir. 1981) 642 F.2d 188, 193.) She argues that the weight of the evidence from Drs. Spellman and Klein supports her position that she is substantially incapacitated from performing the duties of an Administrative Assistant III, Instruction. Respondent emphasizes that these doctors observed her over time in contrast to Dr. Anees who examined her for 30 minutes. She also criticizes Dr. Anees for relying too heavily on her MOCA score he performed. Respondent further argues that Dr. Anees did not consider her initial 2010 MS diagnosis, exacerbations of her condition in 2016 and 2017, and Dr. Klein's October 1, 2019, "progress note." Dr. Anees also did not have a correct description of respondent's job duties because he initially evaluated whether she could perform the job duties of a Library Technician III, the job the college assigned her to because she was unable to perform the duties of an Administrative Assistant III, Instruction. In addition, respondent argues that his report does not indicate he analyzed whether respondent could perform the specific duties of an Administrative Assistant III, Instruction position.

Respondent asserts further that complainant's objections to the admission of respondent's medical records are unfounded citing Government Code section 11513 subdivision (c), because these records are the type of records persons generally rely in the conduct of serious affairs. At any rate, respondent argues these records supplement and clarify respondent's and Dr. Anees's testimony.

LEGAL CONCLUSIONS

Disability Retirement, Burden and Standard of Proof

1. To be retired for disability, a member must be substantially unable to perform his or her usual duties. (*Hosford v. Board of Administration, supra*, at pp. 859-860; *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Discomfort, which may make it difficult to perform one's duties, is not enough by itself to qualify for a disability retirement. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207; *Hosford v. Board of Administration, supra*, at p. 862.)

The employee seeking a service-connected disability retirement bears the burden of proving he or she is substantially incapacitated for the performance of his or her usual duties by a preponderance of the evidence. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332; *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5; *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 691; Evid. Code, §§ 115, 500.) A preponderance of the evidence means "'evidence that has more convincing force than that opposed to it.' [Citation.]" (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Applicable Statutes

2. Government Code section 20026 defines "disability" and "incapacity for performance of duty," for purposes of a retirement, to mean "disability of permanent or extended and uncertain duration" based on "competent medical opinion."

3. Government Code section 21150, subdivision (a), provides that a member who is "incapacitated for the performance of a duty" shall receive a disability

retirement. Section 21151, subdivision (a), provides that such incapacitated member shall receive a disability retirement regardless of age or amount of service.

4. Government Code section 21152, provides in part: Application to the board for retirement of a member for disability may be made by:

(a) The head of the office or department in which the member is or was last employed, if the member is a state member other than a university member.

[¶] . . . [¶]

(c) The governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency.

(d) The member or any person in his or her behalf.

5. Government Code section 21153 provides:

Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirements as provided in section 20731.

6. Government Code section 21154 provides in part:

The application [for disability retirement] shall be made only (a) while the member is in state service, . . . On receipt of an application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

7. Government Code section 21156 provides that if the medical evaluation or other evidence demonstrates that an eligible member is incapacitated physically or mentally, then CalPERS shall immediately retire the member for disability. The determination of incapacitation shall be based on competent medical opinion.

Appellate Authority

8. "Incapacitated" means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. When an applicant can perform his or her customary duties, even though doing so may be difficult or painful, the public employee is not "incapacitated" and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873; *Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049, 1057.)

Competent Medical Opinion

9. CalPERS makes its determination whether a member is disabled for retirement purposes based upon "competent medical opinion." That determination must be based "on the evidence offered to substantiate the member's disability." (*Lazan v. County of Riverside* (2006) 140 Cal. App. 4th 453, 461.) The court in *Lazan* stresses the need, as Section 20026 requires, to determine based on "competent medical opinion" whether the employee "'is incapacitated physically or mentally for the performance of his or her duties in the state service and is eligible to retire for disability.'" (*Id.*, at 461 quoting Section 21156.)

10. Evidence Code section 801 provides:

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Statutes and Authority Regarding Hearsay in Administrative Proceedings

11. Government Code section 11513, subdivision (c), provides:

The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

12. Government Code section 11513, subdivision (d), provides in part:

"Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

13. Unless admissible over objection in civil actions, hearsay evidence shall not be sufficient in itself to support a finding in an administrative proceeding. (*Carl S. v. Commission for Teacher Preparation & Licensing* (1981) 126 Cal.App.3d 365,371.)

14. Hearsay evidence is not competent evidence that can independently support a finding. (*McNary v. Department of Motor Vehicles* (1996) 45 Cal.App.4th 688.)

Analysis

15. Respondent did not meet her burden of proof and her appeal is denied for these reasons:

16. A finding of disability or incapacity for the performance of duty must be based on "competent medical opinion." (Gov. Code, §§ 20026, 21156, subd. (a)(2).) As the court in *Lazan* states in its discussion, "competent medical opinion" is needed to determine whether the employee "'is incapacitated physically or mentally for the performance of his or her duties in the state service and is eligible to retire for disability.'" (*Lazan, supra*, at 461, quoting Section 21156.)

17. Respondent did not present admissible competent medical *opinion* evidence that she was substantially incapacitated from performing the duties of an Administrative Assistant III, Instruction to support her appeal. The only competent medical *opinion* in the record is found in Dr. Anees's testimony that respondent was not incapacitated from the performance of her duties as an Administrative Assistant III, Instruction. His opinion cannot be disregarded, as respondent seeks, simply based on respondent's testimony and her medical records. These records document she suffered from fatigue and other symptoms, but conclusions regarding their significance and relation to her neurological condition can't be made without expert testimony. Determining both the nature of respondent's neurological condition, and whether that condition incapacitated her from the performance of her duties, is sufficiently beyond common experience that expert testimony is required. Respondent's treating neurologists did not testify or offer written reports that were admitted.

18. To the extent respondent argues that Dr. Klein's opinions in the Supplemental Questionnaire, the Physician's Report on Disability, and his October 1,

2019, letter, relating to respondent's ability to perform the duties of the position, are admissible under Government Code section 11513, subdivision (c), her argument is not accepted. This section provides, in part, that evidence responsible persons are accustomed to rely in the conduct of serious affairs is admissible notwithstanding the rules of evidence. Though respondent does not reference these items specifically in her closing brief, except to include them among respondent's records she believes are admissible, it cannot be found that these documents are the sorts of documents "responsible persons are accustomed to rely in the conduct of serious affairs." Respondent also argues that as hearsay the records supplement and "clarify" respondent's and Dr. Anees's testimony and constitute administrative hearsay per Government Code section 11513, subdivision (d). This argument is also not accepted. Her assertion that administrative hearsay applies to these records is simply too vague to credit because respondent does not explain how the records supplement and clarify respondent's and Dr. Anees's testimony. Moreover, Dr. Anees reviewed these records as part of his finding that respondent was not disabled.

19. Respondent's remaining arguments as she states them in her brief have been considered and are also found not persuasive. Specifically, Dr. Anees's testimony is not rejected because initially he incorrectly considered whether respondent could perform the duties of a Librarian III not an Administrative Assistant III, Instruction. After he wrote his first report, he reviewed the job qualifications of an Administrative Assistant III, Instruction and based on the job qualifications of this position, he maintained she was not substantially incapacitated from performing the job duties of it. Dr. Anees also was aware of respondent's medical history since 2010 and he had a good understanding of her complaints and problems.


Cause Exists to Deny the Application

20. Cause exists to deny respondent's application for disability retirement based on neurological (MS and cognitive impairment) conditions. Respondent failed to establish by a preponderance of the evidence that she was permanently disabled or incapacitated from performing her usual and customary duties as an Administrative Assistant III, Instruction when she filed her application for disability retirement.

ORDER

Respondent Angela M. Aceves's application for disability retirement based on neurological conditions is denied.

DATE: February 10, 2022


Abraham M. Levy (Feb 10, 2022 09:34 PST)

ABRAHAM M. LEVY

Administrative Law Judge

Office of Administrative Hearings